

INQUIRY CONCERNING A) Supreme Court
JUDGE, NO. 02-487) Case No. SC03-1171

The Judicial Qualifications Commission, by and through its Special Counsel, pursuant to Rule 9.300(a), Florida Rules of Appellate Procedure, submits this Response to the Respondent Judge Gregory P. Holder's Motion for Award of Attorneys' Fees.

The first charge alleged in essence that on or about January 1998, Judge Holder, who at the time held the rank of Lieutenant Colonel, United States Air Force Reserve, plagiarized a research report for an Air War College course he was taking at McDill Air Force Base, which research report was submitted in fulfillment of a writing requirement of the course and generally considered a prerequisite for a promotion to Colonel. The second charge

was that in submitting the plagiarized research report, Judge Holder certified that he had not used another student's research report and that the creative process of researching, organizing and writing his report represented only his own work, and that the certification was false and constituted a federal criminal violation law of Section 18, United States Code § 1001 for knowingly and willfully making a materially false statement in a matter that was within the jurisdiction of the executive branch of the Government of the United States. The Notice of Formal Charges alleged that, if the acts occurred, they were in violation of Canon 1 of the Code of Judicial Conduct which requires a judge to uphold the integrity of the judiciary, Canon 2 which requires judges to avoid impropriety and the appearance of impropriety in all of the judge's activities, and Canon 5, which requires that a judge conduct all of the judge's extra-judicial activities so that they do not demean the judicial office. A copy of the Notice of Formal Charges is attached hereto as Exhibit "A".

The case was tried before a Hearing Panel of the Commission from June 6 to June 14, 2005. On June 23, 2005, the Hearing Panel entered an Order of Dismissal. In the Order, the Hearing Panel stated that "the charges concerned alleged plagiarism by Judge Holder of an Air War College

research paper which Judge Holder wrote while a Lieutenant Colonel in the Air Force Reserve". The Panel found that "the evidence was extremely conflicting and the implications disturbing", and that while "the evidence was troublesome [it] did not rise to the level of clear and convincing evidence of guilt." A copy of the Order of Dismissal is attached hereto as Exhibit "B".

The Respondent bases his claim for attorneys' fees on the common law of Florida citing as authority Thornber v. The City of Fort Walton Beach, 568 So.2d 914 (Fla. 1990) and Ellison v. Reid, 397 So.2d 352 (Fla. 1st DCA 1981). In Thornber, three Fort Walton Beach city council members sought reimbursement of their legal fees incurred in defending against a recall petition based upon their private meeting to discuss a pledge they had made to clean up city government by seeking the resignation of the city attorney and the city manager's dismissal and their vote at a public City Council meeting for resolutions calling for the attorney's and manager's resignations. This Court held that the council members were entitled to reimbursement for their attorneys' fees under the common law holding that "for public officials to be entitled to representation at public expense, the litigation must (1) arise out of or in

connection with performance of their official duties and
(2) serve a public purpose.” This Court then noted that

unquestionably, the vote taken at the public meeting was within their official duties. There is a sufficient nexus between the firing of these employees and the Council members’ official duties to satisfy the first prong of this test.

568 So.2d at 917.

In Ellison, the question was whether the Palm Beach County Property Appraiser properly expended public funds for the payment of attorneys’ fees incurred by him in successfully defending charges of official misconduct before the Florida Ethics Commission. The charge was that the Property Appraiser improperly gave examination papers to his employees while attending a training program sponsored by the Department of Revenue and plagiarized an appraisal report in order to obtain a professional property appraiser’s designation. The Circuit Court found that the expenditure for attorneys’ fees was proper and the First District Court of Appeal affirmed because at the time the Property Appraiser was attending a training program sponsored by the Department of Revenue which was required by statute to conduct schools to upgrade assessment skills in both state and local assessment personnel and “there is

no doubt a valuable public purpose is served in protecting the effective operation and maintenance of the administration of a public office." (397 So.2d at 54). See also Attorney General's Opinion 93-21, 1993 WL 361721 (Fla. A.G.), in which the Attorney General in answer to a question from a County Attorney stated that a County Judge was entitled to reimbursement from the State of expenses incurred in defending charges before the Judicial Qualifications Commission if "the proceedings arose out of or in connection with the performance of the judge's official duties ..."

In this case, the formal charges against Judge Holder relate to an Air War College research paper he wrote in his capacity as a Lieutenant Colonel in the United States Air Force Reserve to fulfill an Air War College requirement of a course he was taking which was generally recognized as a prerequisite for a promotion to Colonel. The preparation of the Air War College research paper and signing the certification did not arise out of or in connection with the performance by Judge Holder of his official judicial duties. Unquestionably, the resolution of the highly publicized charges against Judge Holder and matters

relating thereto¹ served a public purpose, but there is not a sufficient nexus between the writing of the paper and the certification and the performance of Judge Holder's official duties as a Circuit Judge to satisfy the first prong of the Thornber list.

The Respondent also cites Section 57.111(2), Florida Statutes, which provides that in civil actions and administrative proceedings initiated by state agencies a "prevailing small business party" may be entitled to attorneys' fees and costs against the state. Judge Holder, however, who is a state employee, does not qualify under this Act because neither state nor private employees are within the statutory definition of a "small business party". Department of Professional Regulation, Division of Real Estate v. Toledo Realty, Inc., 549 So.2d 715 (Fla. 1st DCA 1989); Thompson v. Department of Health and Rehabilitative Services, 533 So.2d 840 (Fla. 1st DCA 1988).

¹ Judge Holder in his defense claimed he was "framed" because of his participation as an undercover agent in an FBI investigation of corruption in the Hillsborough County Courthouse.

Significantly, the Respondent does not cite Article V, Section 12(c)(2) of the Florida Constitution, which provides that the Supreme Court may award costs to the prevailing party in a Judicial Qualifications Commission proceedings, or to In Re Hapner, 737 So.2d 1075 (Fla. 1999), in which this Court held that under this provision "the costs assessed in a JQC proceeding must be kept within strict bounds", that "the amount of taxed costs must not be so substantial that costs will deter either the JQC from initiating a prosecution or a judge from defending against a charge", and that "attorneys' fees may not be awarded as costs". (737 So.2d at 1076-77).

For the foregoing reasons, the Motion for Award of Attorneys' Fees should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to each of the following by United States mail this _____ day of August, 2005.

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